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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 447

NICOLA MASSA,

Petitioner,

—against—

Ca. VENEZUELAN NAVIGACION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its order and judgment herein entered the 3rd day of June, 1964.

Opinions Below

332 F. 2d 779—Opinion of Court of Appeals (1a).

298 F. 2d 229—Opinion of Circuit Court of Appeals on prior appeal after first trial (18a).

Jurisdiction

The Court of Appeals order herein was dated and entered June 3rd, 1964.

Jurisdiction of this Court to review the subject order by writ of *certiorari* is predicated on 28 U. S. C. 1254 (1).

Questions Presented

1. Is not the holding by the Court of Appeals for the Second Circuit in the instant case contrary to the holdings by the Court of Appeals for the Third Circuit in the cases of *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 and *Thompson* v. *Calmar S.S. Corp.*, 331 F. 2d 657, and inconsistent with the holding by this Court in *Gutierrez* v. *Waterman*, 373 U. S. 206, 83 S. Ct. 485, in treating with the question of negligently and non-negligently created unseaworthiness proximately causing maritime injuries?

2. Is a trial judge, on a re-trial of the same issues, bound by an oral stipulation entered into by the parties during a prior trial which conclusively established the same fact in issue in both trials?

Laws Involved

New York State Civil Practice Law and Rules:

> "R. 2104 STIPULATIONS. An agreement between parties or their attorneys relating to any matter in an action, *other than one made between counsel in open court*, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." (Emphasis supplied.)

Statement

District Court jurisdiction was based on 28 U. S. C. 1332.

This was a second trial. Prior to the commencement of the trial, the question arose as to whether or not the appellant had the mental capacity to testify on his own behalf.

In support of the contention that appellant did not have such mental capacity, plaintiff called two witnesses, Joseph Massa, his son (Summary, Appendix A), and Filomena Massa, his wife (Summary, Appendix B).

We quote from pages 93 and 94 of the minutes.*

"The Court: I think that you gentlemen want to put a stipulation on the record, do you not, with reference to the testimony in this case of the plaintiff, Nicola Massa?

Mr. Rassner: Yes, your Honor.

May the record show that it is hereby stipulated and agreed by and between counsel for the respective parties hereto that the calling of Nicola Massa to resume the stand is dispensed with, and he is excused from testifying on his own behalf, and that in lieu thereof we will offer in evidence the entire transcript of his testimony on the prior trial to be considered with the same force and effect as if he had so testified in court on this trial.

Mr. Giallorenzi: Defendant and third party plaintiff so stipulate.

Mr. McKernan: And the third party defendant so stipulates."

---

*All references hereinafter refer to pages of the minutes.

Nicola Massa was a stevedore in the employ of John W. McGrath Corporation, engaged in loading the S. S. Ciudad De Cumana on the 24th day of February, 1955, at Pier 10, North River, New York.

A pallet was being hoisted by means of the ship's winch. At the time of the accident, the equipment involved, *i.e.*, the pallet, the bridle and the cable, was dangling in the air attached solely to the ship. The plaintiff was below the material, standing on the pier. When the bridle parted from the pallet, the pallet and its cargo plummeted down upon him, fracturing his left leg and causing other severe injuries.

In each side of the pallet there were two openings or slits which had been cut into the wood for the purpose of receiving flanges attached to a metal bar. The bar was part of a bridle consisting of four wires, one attached to the bar at each corner of the pallet. The bridle was the final portion of the cable extending over the ship's side from the ship's winch.

The plaintiff testified that he had finished hooking up the draft when the accident occurred. He stated that the draft "went up about nine, ten feet up, the pin, the bridle come off the pallet and he come down. It hit on me. So I went down and I got hit and I can't get up. I was unconscious for fifteen minutes or so. Then they take me to the hospital."

Plaintiff explained that the pallets came already loaded to his place of work. He and three others served only to hook the pallet to the bridle so that the pallet could be lifted to the ship. The pallets were hooked to the bridle by the insertion of two prongs on each side in the holes provided therefor in the sides of the pallets.

The plaintiff stated that "Sometimes the hole is no good, and then they slip out."

Plaintiff specifically stated that the pallet which injured him went "straight up" after he and the three others attached it to the bridle. Plaintiff stated he saw the bridle come off the pallet and that the pallet then fell down. He stated this occurred after the pallet had been hauled up by the ship's cable about ten feet.

Plaintiff's contention was corroborated by two fellow longshoremen, Louis DeMeo and Frank Marrocolla.

The medical proof supported plaintiff's contention that his injuries resulted in permanent disability.

Both Venezuelan and McGrath admitted that the "top" pallet fell, but contend that on the basis of observation "after the accident," the "inference" may be drawn that the pallet fell by reason of the manner of the work and not by reason of a defect in the pallet.

The evidence relied on for this contention is that the top pallet, which was examined shortly after the accident was free from any defect and perfectly safe, sound and adequate for the purpose intended.

The circumstances and positioning of the pile of pallets and the bridle constituted facts from which the inference can be drawn that the stevedores affixed one bar of the bridle by inserting the flanges in the slots on one side of the top pallet, but into slots of the pallet below the top one on the opposite side.

The pallet involved in the accident was one of a pile of four.

The pallet testified to by the defendant's witnesses was one of a pile of three.

If there were four pallets before the accident and only three after the accident, obviously the pallet involved in the accident had been removed, as established by the testimony of plaintiff and his witnesses.

The basis for plaintiff's contention that defense testimony concerned a pallet unrelated to the accident is the following excerpt. This is a stipulation during plaintiff's testimony in the prior trial, in evidence in this trial.

> "Mr. Rassner: We can agree for the record that there were three empty pallets piled one on top of the other?
>
> The Court: On the platform?
>
> Mr. Rassner: On the platform. The hi-lo brought a loaded pallet and placed—and the several men, four in number, as far as I can find out from the investigation, physically lifted the pallet with the cargo, and put them on top of the three empty pallets, and that is when they hooked them up.
>
> The Court: Then they hooked it up. Do we agree to that?
>
> Mr. McKernan: Yes. That is, prior to the accident, shortly prior thereto.
>
> Mr. Rassner: Yes.
>
> Mr. Giallorenzi: Yes.
>
> Mr. Rassner: We agree.
>
> Mr. McKernan: I will agree.
>
> The Court: Thank you."

To obviate any question but that the pallet involved in the accident was a fourth pallet not present at the time defense witnesses appeared at the scene of the accident, is established by the following further excerpt from the stipulation during plaintiff's testimony in the prior trial, in evidence in this trial.

"The Court: All I am concerned with is this: as to the pallet which we call number *four*, was placed on the pile, was it ready to be hoistsed, or did something have to be done before it was hoisted?

Mr. Rassner: We all agree that we had to put the plugs in, and that is the two aluminum bars, each aluminum bar having two plugs, aluminum plugs, and that his job, we will further stipulate was to assist in putting help put the aluminum bars into the pallet." (Italics ours)

Objection was duly taken but overruled and testimony was accepted as to the third pallet.

This testimony was clearly intended to describe the pallet involved in the accident.

Jacques Wagemaker, McGrath's superintendent, was permitted, over plaintiff's objection, to testify as to the "third" pallet which he saw after the accident (494).

"The Court: I am sure we are talking about the same pallet? The top pallet of the pile. The top pallet of the pile, that is, three. Three pallets, one on top of the other?

The Witness: Yes, your Honor."

* * *

(495, 496)

"Q. Describe the pallet that you saw. A. As I said before, it was a pile of pallets in disarray which the two top pallets were in disarray. The pallet facing the bar with tongs, and facing the forward end of the ship was inserted in the top pallet, and the second bar facing the after end of the ship was inserted in the second pallet.

Mr. Rassner: I ask that the answer be stricken as not relating to the pallet in question."

* * *

(496, 497)

"The top pallet had some cargo on. A few cartons.

The Court: I don't quite get the picture yet.

These two pallets that you have referred to was one on top of the other?

The Witness: Yes, your Honor.

* * *

(497, 498)

"The Witness: No,—the top pallet, if I might describe the side on which the bar was inserted? That was the bar facing the forward end of the ship.

That was inserted into the top pallet. The bar facing the after end of the ship was inserted in the second pallet and partially inserted in there.

Mr. Rassner: Now, may I reserve my right to move to strike his testimony because he has testified in the prior trial, and my objection is that he did not actually see the pallet in question.

The Court: I don't know yet—."

When Wagemaker came to the scene of the accident, he saw the following:

(501, 502)

"The Witness: There were an original pile of two pallets. The cargo pallet with the cargo is placed on top of this pile which makes it three pallets.

The Court: All right, and there were how many when you went there?

The Witness: Three.
So the top pallet is the third pallet.
The Court: So, there were three?
The Witness: Yes."

He further testified as follows:

(604)

"Q. Now, you didn't see the pallet fall, did you? A. No, sir.

Q. And when you got there, the pallet that you saw was the third one on other pallets, is that right? A. The third one on top of other pallets?

Q. There were two pallets, and the one that you saw was the third one? A. Yes.

Q. And that one was loaded with cargo when you got there? A. Yes, and the gear was resting on top of it."

George John Paul Lucas, employed by A. H. Bull Steamship Company as vice president in charge of terminals, testified that he arrived at the scene of the accident after its occurrence.

He was permitted to testify over plaintiff's objection, in spite of the fact that he admitted that he didn't know whether the pallet he was describing was the one involved in the accident (616). He did not see the pallet involved in the accident, for when he got there, there were only three pallets there.

(638, 639)

"The Court: You went over to the stringpiece, you saw some pallets there?
The Witness: That's right.
The Court: How many?

The Witness: Three.
The Court: One on top of the other?
The Witness: That's right.
The Court: In order?
The Witness: No. After I attended to Massa, I then proceeded to the stringpiece, and there were three pallets which had been placed in order."

There was no testimony to support the contention of the respondent and respondent impleaded that the stevedores inserted prongs into the slots on one side of the top pallet, and on the opposite side in the slots on the pallet below the top pallet.

The Court's finding of fact was based on respondent's unproven contention and not on any testimony which had probative value.

The testimony as to the positioning of the bridle and its appurtenances after the accident does not have any probative value, for by that time the fourth pallet which was, by stipulation, present at the time of the accident had been removed.

The respondent failed to call or explain the failure to call various people who concededly were eye witnesses to the accident; failed to have any log entry as to the accident; failed to call anyone or produce any records as to broken or defective pallets brought to the "hospital pile" on the day of the accident; failed to produce any accident report of the hatch boss who was at the scene of the accident.

The defense tended to and did mislead the learned Court below into believing that the pallet involved in the accident was the third pallet. The third pallet was not involved in the accident, as the pile consisted of four pallets, not three, and the third pallet became the top pallet when the defective pallet was removed from the scene.

Appellant sustained his burden of proof as to liability.

The fact that the pallet fell with resultant injury to the appellant, constituted sufficient evidence of breach of warranty of seaworthiness, in the light of the uncontradicted evidence that the pallet was being used in the usual manner and normal fashion.

Part of appellant's testimony was supplied by way of stipulation.

In lieu of the appellant testifying as to the number of pallets which composed the base or pile of pallets, the following evidentiary matter was conceded and became part of the appellant's testimony in the prior trial.

We quote the precise stipulation, which appears at pages 36, 37 and 50 in the minutes of the prior trial.

> "Mr. Rassner: We can agree for the record that there were three empty pallets piled one on top of the other.
>
> The Court: On the platform?
>
> Mr. Rassner: On the platform. The hi-lo brought a loaded pallet and placed—and the several men, four in number, as far as I can find out from the investigation, physically lifted the pallet with the cargo, and put them on top of the three empty pallets, and that is when they hooked them up.
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> Mr. Giallorenzi: Yes.
>
> Mr. Rassner: We agree.
>
> Mr. McKernan: I will agree.
>
> The Court: Thank you."

"The Court: All I am concerned with is this: as to the pallet which we call number four, was placed on the pile, was it ready to be hoisted, or did something have to be done before it was hoisted?"

This stipulation is in evidence as part of the cross examination, within the specific designation, as appears at page 94 of the minutes in the present trial.

It was stipulated that the entire transcript of the testimony of the appellant in the prior trial, be considered with the same force and effect as if the appellant had testified at this trial (93, 94).

To obviate any question as to just what the transcript should include, it was specifically stated at page 94 that pages 2 to 17, and pages 17 to 83 of the prior testimony are the pages that would be included as evidence in this case.

Within these pages and specifically at pages 36, 37 and 50 is the stipulation as to the conceded facts. These facts were conceded as a substitute or in lieu of the appellant testifying thereto.

Reasons for Granting the Writ

Re: The First Question Presented.

The two Circuits, the Second and Third, carrying the major burden of maritime litigation in ths country are in direct conflict with each other as to the proper standard to apply in determining liability for maritime accidents proximately caused by negligent and non-negligent stevedore operations.

Not only is the Court of Appeals for the Second Circuit in conflict with the Third, as aforesaid, but in addition thereto, the holding in the instant case is inconsistent with

the holding of this Court in the case of *Gutierrez* v. *Waterman*, *supra*, p. 2[1].

The present situation does violence to the American concept of equal justice to all, in that cases tried in one district result in an award of damages against a shipowner, whereas on the identical facts, the shipowner is granted immunity from liability if tried in another district.

To permit this unsettled state of the law to continue without clarification and settlement by this Court would encourage injured workers and or their dependents to shop around for a more favorable forum in which to litigate their rights and thus inevitably result in unequal administration of justice on identical factual situations.

This lack of uniformity, which presently exists, merits clarification by this Court, not only in the interest of the victims of maritime disasters but, likewise, to establish the nature and extent of a shipowner's obligations. The desire for uniformity in treating with maritime problems is important to all parties concerned with maritime accident

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[1] There is also an intra-circuit conflict which merits this Court's review.

This Court has granted *certiorari* to bring about uniformity within a Circuit.

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221; *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322.

As to the intra-circuit conflict in the Second Circuit, see also:

Pinto v. *States Marine Corp.*, 296 F. 2d 1, *en banc* hearing denied, dissenting opinion by CLARK, C.J., SMITH, C.J. concurring in dissent, cert. den. 369 U. S. 843, rehearing denied, 369 U. S. 891; *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215; CLARK, C.J., dissenting, cert. den. 369 U. S. 843, rehearing denied, 369 U. S. 891.

liability throughout the nation. The fact that this question is of national importance to the entire industry is highlighted by the fact that opposing interests are asking this Court, as is this petitioner, to clarify and settle the question presented. See petitions for certiorari pending in *Swedish American Lines* v. *Ferrante* (No. 275, Oct. Term, 1964) and *Calmar S. S. Corp.* v. *Thompson* (No. 398, Oct. Term, 1964).

Shipowners' interests in the two above cited petitions, *supra*, state that the decision in the instant case is in conflict with holdings by other courts in *Blankenship* v. *Ellerman's Wilson Line* (4 Cir.), 265 F. 2d 455, and *Arena* v. *Luckenbach S. S. Co.*, (1 Cir.), 279 F. 2d 186, cert. den. 364 U. S. 895.

Re: The Second Question Presented.

It is of importance in the trial of all cases in all Federal courts to settle the law of evidence as to what force and effect is to be given to stipulations made by counsel, during a prior trial, as to a factual matter stipulated to in open court.

This case was tried in New York State and the holding by the trial court, affirmed by the Court below, is contrary to well-established law that a Federal court is bound to follow the law of the of the State in which it sits as to rules of evidence. This question comes within the concept of this Court's supervision of Federal practice and procedure, and merits review and clarification.

Stiplations are of basic importance in clarifying issues and shortening litigation: are of the highest calibre of proof and merit this Court's stamp of approval as such.

POINT I

The holding of the Court below is inconsistent with this Court's prior decision.

The decision in the instant case has applied principles of law in a manner inconsistent with that given by the Supreme Court of the United States in the case of *Gutierrez* v. *Waterman*, 373 U. S. 206, 83 S. Ct. 1185.

The court below was in error in relying on the principle of control which is inconsistent with the holding in *Gutierrez, supra.*

POINT II

Inter-Circuit conflict merits this Court's certiorari review.

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221;
Dickinson v. *Petroleum Conversion Corp.*, 338 U. S. 507.

The decision below is in conflict with the holding by the Third Circuit in the cases of *Ferranie* v. *Swedish American Lines*, 331 F. 2d 571, and *Thompson* v. *Calmar S. S. Corp.*, 331 F. 2d 657.

The court below, contrary to the above holdings, predicated its decision on control, of the accident-causing mechanism, by the stevedore and the negligence of the plaintiff and his fellow-workman.

The decision below, therefore, destroys the uniform application of principles of maritime law.

POINT III

Intra-Circuit conflict merits this Court's certiorari review.

The court below has enunciated a radical principle of law in conflict with its prior holding in *Grillea* v. *U. S.* (2 Cir.), 232 F. 2d 919, approved by this court in *Reed* v. *Yaka*, 373 U. S. 410, 83 S. Ct. 1349.

The holding by the court below makes proof of negligence a necessary element to establish liability, even in actions where no negligence is pleaded or attempted to be proved but where liability is predicated exclusively on breach of warranty of seaworthiness, as in the instant case.

POINT IV

Certiorari review is necessary to re-establish and maintain the desired uniformity of the General Maritime Law.

The decision by the court below destroys the uniformity of the maritime law. It is inconsistent with the holding in the *Gutierrez* case, *supra*; conflicts with the decisions in the Third Circuit in *Thompson*, *supra*, and *Ferrante*, *supra*; conflicts with the prior decision in its own circuit in *Grillea*, *supra*, and, in addition thereto, has injected into maritime law the need of proving negligent causation of unseaworthiness and control by the shipowner as conditions precedent to impose liability for breach of warranty of seaworthiness.

This places an unwarranted burden upon personal injury victims, and next of kin in fatal accidents, and encourages the shopping around for a more favorable forum.

POINT V

Stipulation by counsel during trial as to a fact conclusively proves the fact and estops party from denying truth thereof in later re-trial.

The court below was in error in that it sustained the holding of the trial court which failed to give effect to a stipulation made during a prior trial as to a substantial and material fact in issue in both trials.

The law is well settled that a Federal Court will apply the rules of evidence of the State in which it sits. F.R.C.P. 43(a); 28 U.S.C. 1652; *Mass. Mut. Life Ins. Co.* v. *Brei* (2 Cir.), 311 F. 2d 463, 470; N. Y. State CPLR 2104 (*supra*, p. 2).

In the case at bar, the court below erroneously sanctioned the failure of the trial court to give effect to an oral stipulation entered into by counsel for the parties in open court during a prior trial.

The stipulation was binding and conclusively established the fact that 4 pallets were in use at the time of plaintiff's injury, whereas the trial court, on the re-trial, rejected this factual stipulation which was determinative of the basic question of unseaworthiness. N. Y. State CPLR 2104.

The stipulation estopped the respondent from contending to the contrary thereof and the trial court was bound by the same principle of estoppel. *Lawrence* v. *Veil*, 166 F. S. 777, 784; *Helvering* v. *Schine Chain Theatres, Inc.* (2nd Cir.), 121 F. 2nd 948, 950; *Arizona* v. *Copper Queen Mining Co.*, 283 U. S. 87, 95, 54 S. Ct. 546, 549; *Dickerson* v. *Colgrove*, 100 U. S. 578, 580; CPLR 2104.

POINT VI

Court of Appeals sanction of lower Court's departure from accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

See Point V, *supra*, p. 17.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, certiorari review is merited herein in order to maintain the uniformity of the general maritime law and in the exercise of this court's power of supervision over practice and procedure in the federal courts in respect to evidentiary value of counsels' stipulations as to facts in issue.

Wherefore, petitioner respectfully prays that this court's writ of certiorari will issue to the United States Court of Appeals for the Second Circuit to review its subject order and judgment and further prays that, on certiorari being granted, this court will reverse the order of the court below.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

APPENDIX A

Opinion of United States Court of Appeals

Before LUMBARD, Chief Judge, and MOORE and SMITH, Circuit Judges.

J. JOSEPH SMITH, Circuit Judge.

Massa, the plaintiff longshoreman, was injured when a pallet being used to load the ship spilled some of its cargo on him. After a jury failed to reach a verdict, the United States District Court for the Eastern District of New York, Mortimer W. Byers, J., dismissed the complaint against the shipowner, C. A. Venezuelan Navigacion, on the ground that the plaintiff had failed to prove a prima facie case. This court reversed and remanded for a new trial, for viewed in the light most favorable to the plaintiff, the evidence was sufficient to support a finding of unseaworthiness. 298 F. 2d 239 (1962). Upon remand, the case was tried before Chief Judge Joseph C. Zavatt, sitting without a jury, who found that the accident was not caused by a defective pallet but by the negligence of the plaintiff and his fellow longshoremen. Concluding that the ship was seaworthy and the shipowner free from negligence, the District Court dismissed the complaint and the third party complaint of the shipowner against the stevedore John W. McGrath Corporation. 209 F. Supp. 404 (1962). The plaintiff now appeals from the dismissal of his complaint, and the shipowner appeals from the dismissal of his third party complaint to recover counsel fees for defending the suit. We find no error in the ruling on the longshoreman's claim and affirm the dismissal of the

complaint, but we reverse the dismissal of the third party complaint and direct the entry of a judgment awarding counsel fees and expenses to the third party plaintiff.

On February 25, 1955 the plaintiff was employed by the stevedore, then engaged in loading cargo onto the defendant's ship. Some of the cargo consisted of cases of lube oil cans, which were loaded evenly on rectangular wooden pallets. Each loaded pallet was brought to the side of the ship by a hi-lo and placed on a platform of two empty pallets, stacked one above the other to facilitate the task of the longshoremen who hooked up the loaded pallets to the ship's gear. The pallet was connected to the winch by a cable and a pallet bridle, which consisted of four wires joined at the top and spreading downward to connect with the ends of the two metal bars. Each of the metal bars was equipped with two protruding metal tongs that fitted into apertures on the ends of the pallet.

The plaintiff was a member of a four man gang of longshoremen whose job was to insert the tongs into the pallet holes. The plaintiff was injured when some of the cargo spilled from a pallet that had been raised about eight feet by the ship's winch. The plaintiff claimed that the accident was caused by the rotting of the wood around the pallet hole, a defect that resulted in the tongs slipping out of the pallet holes. However, the trial court found that the accident was caused by the plaintiff and his fellow longshoremen inserting the tongs into the apertures in the empty pallet lying immediately beneath the loaded pallet into which they were supposed to insert the tongs. Thus, one of the metal bars was connected to the top pallet and the other connected to the empty pallet of the platform beneath.

Appendix A

I.

On this appeal the plaintiff claims that the findings of the trial court must be set aside as clearly erroneous and that the testimony of the defendant's witnesses must be disregarded because the parties at a previous trial had stipulated that there were three empty pallets stacked together as a platform. Since the trial court found that there were only two empty pallets in the supporting platform, the plaintiff claims that the court below must have been hoodwinked into believing that the plaintiff's witnesses and defendant's witnesses were all describing the same pallet. The basis of this contention is that "the only inference justified by the evidence was that the defective pallet was removed from the scene of the accident and that the witnesses who testified on behalf of the respondent did not see and knew nothing about the condition of the pallet involved in the accident."

[1] This argument is nothing but vain imaginings. There is not a shred of evidence that anyone spirited away the pallet involved in the accident before the defendant's witnesses arrived at the scene, and there is substantial testimony to the contrary. The defendant's witnesses described the pallet partially loaded with cans of lube oil, and it is clear from the record that the pallet they were describing was the one alleged by the plaintiff to be defective. There was no stipulation at this trial that there were three pallets in the supporting platform. Because the parties unfortunately stipulated to the presence of three empty pallets in the platform at a previous trial during the plaintiff's cross-examination does not mean that they stipulated to such effect when they agreed that the plaintiff, for medical reasons, would be excused from testifying and that his prior testimony would be accepted into evidence.

[2-4] There is no conflict between this court's earlier decision in this case and the result reached by the District Court. We remanded the case for a trial on its facts because the plaintiff had alleged sufficient facts, if proven, to entitle him to a verdict. But the plaintiff failed to prove these facts. The only witness to testify that the wood around the pallet holes had rotted was Marrocolla, and the trial court was not obligated to credit his testimony, particularly since it conflicted with his prior testimony and the testimony of the defense witnesses. Nor can we say that the plaintiff and his co-worker had rendered the ship unseaworthy by placing the tongs in the wrong holes. The doctrine of unseaworthiness requires no more than that a ship and appurtenances be reasonably fit for their intended use, and the trial court was justified in concluding that the pallets were reasonably fit. See Hooper v. Terminal Steamship Co., 296 F. 2d 281 (2 Cir. 1961); Pinto v. States Marine Corp. of Del., 296 F. 2d 1 (2 Cir. 1961), cert. denied 369 U. S. 843, 82 S. Ct. 874, 7 L. Ed. 2d 847 (1962).

II.

[5-7] There is considerably more merit to the shipowner's appeal, and we think the District Court erred in dismissing the third party complaint. If the stevedore fails to use reasonable care in handling equipment or cargo, resulting in foreseeable or potential loss to the shipowner by rendering it likely to suit, the stevedore has breached its warranty of workmanlike service. Paliaga v. Luckenbach Steamship Co., 301 F. 2d 403, 408 (2 Cir. 1962); Damanti v. A/S Inger, 314 F. 2d 395, 397 (2 Cir. 1963), cert. denied, Daniels & Kennedy, Inc. v. A/S Inger, 375 U. S. 334, 84 S. Ct. 46, 11 L. Ed. 2d 64 (1963). The stevedore is obligated to indemnify the shipowner for any loss in-

curred because of the stevedore's breach of its warranty of workmanlike service, and this obligation extends to the litigation expenses of defending suits brought against the shipowner. Nicroli v. Den Norske Afrika, 2 Cir. 1964, 332 F. 2d 651; Paliaga v. Luckenbach Steamship Co., supra; Guarraccino v. Luckenbach Steamship Co. v. Turner & Blanchard, Inc., 2 Cir. 1964, —— F. 2d ——. There is no question that the stevedore breached its warranty to perform in a workmanlike manner, for the trial court found that the cause of the accident was the negligence of the stevedore's employees. This negligence rendered the shipowner liable to suit, and we see no good reason for forcing the shipowner to bear the expenses of successfully defending the suit when the stevedore would have to bear the shipowner's expenses of unsuccessfully defending the suit. Such a rule would place a premium on losing lawsuits. In Paliaga v. Luckenbach Steamship Co., supra, this court held it an abuse of discretion to dismiss a third party complaint for the shipowner's counsel fees where the stevedore had settled with the plaintiff longshoreman. As the Fifth Circuit correctly observed in Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V., 324 F. 2d 746, 747 (5 Cir. 1963), cert. denied, 84 S. Ct. 1219 (1964), the case for the shipowner in this situation is stronger than it was in Paliaga. The isolated cases which have refused to award counsel fees to the shipowner in this situation have been sharply criticized; one has even been repudiated by its author. Bielawski v. American Export Lines, 220 F. Supp. 265 (E. D. Va. 1963). The better reasoned cases support the award of counsel fees to the successful shipowner. Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V., supra; Gonzales v. Penna. Railroad Co., 183 F. Supp. 779 (S. D. N. Y. 1960). The burden is best

placed on the stevedore who can minimize expense and injury by insisting on greater safety precautions, Guarraccino v. Luckenbach Steamship Co., supra.

We hold that the District Court abused its discretion in failing to permit the recovery of counsel fees on the third party complaint.

Inasmuch as the parties have agreed that the $6,600 in counsel fees expended by the shipowner is fair and reasonable, we direct the entry of judgment against the stevedore for that amount plus disbursements of $999.81, making a total judgement of $7,599.81. Since part of the shipowner's efforts on appeal were devoted to resisting the claims of the plaintiff, we also tax the stevedore $300 for reasonable attorney's fees on that portion of the appeal to be paid to counsel for the shipowner. Nicroli v. Den Norske Afrika, supra; Guarraccino v. Luckenbach Steamship Co., supra.

The order dismissing the complaint is affirmed. The order dismissing the third party complaint is reversed and the entry of judgment for the third party plaintiff is ordered.

APPENDIX B

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of June, one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
Circuit Judges.

NICOLA MASCA,
Plaintiff-Appellant,

vs.

C. A. VENEZUELAN NAVIGACION,
Defendant and Third Party
Plaintiff-Appellant,

vs.

JOHN W. McGRATH CORPORATION,
Third Party Defendant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and is hereby is affirmed.

It is further ordered, adjudged and decreed that the order dismissing the third party complaint be and it hereby is reversed with directions that a judgment against the third party defendant-appellee, John W. McGrath Corporation, be entered in the sum of $7,599.81 for the third party plaintiff-appellant, C. A. Venezuelan Navigacion, and in the sum of $300. for counsel to said shipowner in accordance with the opinion of this court with costs to the third party plaintiff-appellant.

A. Daniel Fusaro,
Clerk.

APPENDIX C

Opinion, Findings and Conclusions of United States District Court on Re-Trial

U. S. District Court
Eastern District of New York
209 F.S. 404

Zavatt, Chief Judge.

The plaintiff, a longshoreman in the employ of the third party defendant, McGrath, seeks damages for personal injuries on the ground of the alleged negligence of the defendant, the owner and operator of the SS Ciudad De Cumana, and on the ground that said Vessel was unseaworthy. By a pre-trial order, dated December 7, 1960, the plaintiff limited the issues of alleged negligence and unseaworthiness to an alleged defective pallet.

During a previous trial, the trial judge granted the defendant's motion to dismiss the complaint and the third party defendant's motion to dismiss the third party complaint after the jury disagreed. On appeal to the Court of Appeals of this Circuit, the judgments of dismissal were reversed and the claims of the plaintiff and the third party plaintiff was remanded for re-trial. Mass v. C. A. Venezuelan Navigacion, 298 F. 2d. 239 (2d Cir. 1962).

The second trial was tried to the court without a jury on the theory that a proximate cause of plaintiff's personal injuries was a defective pallet, the use of which in the loading of the vessel constituted negligence on the part of the defendant and rendered the defendant's vessel unseaworthy. In view of the findings of fact and conclusions of law herein, it is unnecessary to discuss the claim over of the defendant against the third party defendant.

Appendix C

Findings of Fact.

The court makes the following findings of fact based upon the credible evidence and the court's view of a loading operation during the trial with the knowledge and consent of the parties and their attorneys and in the presence of said attorneys:

1. On February 24, 1955, the SS CIUDAD DE CUMANA, owned, operated, managed and controlled by C. A. Venezuelan Navigacion, the defendant and the third party plaintiff, was berthed at Pier 10, North River, within the Eastern District of New York, for purposes of taking a cargo.

2. On February 24, 1955, the third party defendant was loading cargo into said vessel pursuant to a stevedoring contract with the defendant and third party plaintiff. The entire loading operation was under the control of the third party defendant.

3. In connection with said loading operations, the third party defendant supplied longshoremen, supervisors, hatch bosses, gangwaymen, hi-lo drivers, gearmen, and assembly known as "pallet bridle" and wooden cargo handling platforms, known as pallets.

4. The "pallet bridle" consisted of a "spreader," a square or rectangular shape metal frame; four wire lines of equal length, known as legs, each extending down from a corner of the "spreader"; two bridle bars made of steel and aluminum, each of which had attached to it two metal protuberances known variously as "plugs", "flanges", "prongs" or "tongs" (which will be referred to herein as "tongs"). The wire "legs" were attached to shackles at the respective ends of the bridle bars. The pallet bridle

was connected to a winch aboard the vessel by means of a ship's cable.

5. The "pallets" measured approximately 5 feet 6 inches in length by 3 feet 4 inches in width. The top and bottom of each pallet were identical—each consisting of a series of parallel slats. The top and bottom of each pallet were separated by four horizontal wooden "cross pieces." Two "cross pieces" served as interior supports. One was located at each end of the pallet. Each end cross piece had two apertures known as "pallet holes" into which the tongs of the pallet bars are inserted when a pallet loaded with cargo, a draft, was to be lifted from the dock to the ship.

Loaded pallets were brought to the side of the ship by means of a hi-lo owned and operated by the third party defendant and were placed upon a platform which consisted of two pallets superimposed one above the other. This platform was so used for the convenience of the four man gang of longshoremen who were to hook up the pallet bridle to the draft or loaded pallet.

Loaded pallets were brought to the side of the ship by means of a hi-lo owned and operated by the third party defendant and were placed upon a platform which consisted of two pallets superimposed one above the other. This platform was so used for the convenience of the four man gang of longshoremen who were to hook up the pallet bridle to the draft or loaded pallet.

7. The pallet bridle was hooked up to the draft by inserting the two tongs of one pallet bar into the two pallet holes at one end of the pallet and the two pallet holes at the other end of the pallet. Each member of the four man gang inserted one tong into one pallet hole. During the

hookup operation, therefore, two members of this gang stood at one end of the platform and the loaded pallet and two members of the gang stood at the other end.

8. At about 11 P.M. on February 24, 1955, a hi-lo owned and operated by the third party defendant placed upon the two-pallet platform a pallet loaded in an even manner with approximately 36 cases of lube oil cans in cartons weighing about one ton.

9. The plaintiff and one Gambardela, a member of the gang, stood at the aft end of the pallet (with reference to the ship). The two other members of the gang, Di Meo and Marrocolla, stood at the forward end.

10. Di Meo and Marrocolla placed the tongs of one pallett bar into the forward pallet holes of the loaded pallet. The plaintiff and Gambardella placed the tongs of the other pallet bar into the aft pallet holes of the pallet immediately below the loaded pallet.

11. In response to a signal from Di Meo and gangway man, the draft was raised by a winch aboard the ship about 8 feet, when some of the cargo spilled from the pallet toward the aft end of the pallet and some of that cargo struck and injured the plaintiff.

12. A few minutes after this accident, the bridle was in a lowered position on top of the said pallet and the pallet, with about a dozen of the cartons still on it, was resting on the platform. The two tongs of the forward pallet bar were fully inserted in the forward pallet holes of the top pallet. The two tongs of the aft pallet bar were partially inserted in the aft end of the pallet immediately below.

Appendix C

13. The top pallet was examined, reloaded with the same cargo; the tongs were properly inserted in the pallet holes at either end by a gang of four longshoremen (not including the plaintiff) and the re-loaded pallet was hoisted in to the ship.

14. The pallet bridle and the loaded pallet hooked up thereto and the pallet improperly hooked up were free from all defects; were reasonably fit for their intended use, i.e., were seaworthy in all respects and neither caused nor contributed to the plaintiff's injury.

15. The defendant was not negligent nor was the vessel unseaworthy.

16. The plaintiff's injuries were caused solely by his own negligence and that of a fellow longshoreman. By inserting the pallet bars improperly, as found above, they caused the loaded pallet to be lifted unevenly thus causing the cargo to spill on the side of the pallet where the plaintiff was standing and to strike the plaintiff and cause him bodily injury. The defendant had no knowledge of nor was he chargeable with knowledge of this fact.

(1-6) Stevedores, when performing "the ship's service," are entitled to the same protection against unseaworthiness as members of the crew doing the same work.[1] This pro-

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[1] This doctrine of seaworthiness, finally settled as to seamen in the Osceola, (1902), 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760 was extended to longshoreman injured aboard ship by Seas Shipping Co. v. Sieracki, (1946), 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, and further extended to longshoremen injured on the docks (under certain circumstances) by Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (2d Cir. 1950), cert. denied (1951) 341 U. S. 904, 71 S. Ct. 614, 95 L. Ed. 1343. These extensions of the doctrine were originally based upon the belief that, historically, the work of loading and unloading a vessel was the work of the vessel's seamen. Contra, Tetreault Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Corn. L. Q. 381 (1954).

tection against unseaworthiness imposes upon the owner of the vessel a nondelegable duty to provide a seaworthy vessel (including appliances appurtenant thereto brought on board by the stevedore) and a competent crew.[2] Stevedores themselves may render a ship pro tanto unseaworthy and thereby impose liability upon the owner of the vessel for injuries they sustain.[3] Under appropriate circumstances, recovery may be had by those working on shore.[4] Liability attaches for a temporary as well as a permanent unseaworthy condition. Mitchell v. Trawler Racer, Inc. (1960), 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d. 941. The duty to furnish a seaworthy vessel does not impose a duty to furnish one that is accident free but, rather to furnish:

"... a vessel and appurtenances reasonably fit for their intended use. The standard is not 'perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.'" Mitchell v. Trawler Racer, Inc. (362 U. S. at 550, 80 S. Ct. at 933).

(7, 8) Since all of the appliances involved in the accident, including the pallet, were seaworthy, the plaintiff may not recover. The doctrine of unseaworthiness has not yet been extended to allow recovery for injuries caused by the

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[2] Pondoni v. Lykes Brothers Steamship Co. (1955), 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 354; Mahnich v. Southern S.S. Co., (1944), 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561; Alaska Steamship Company v. Petterson (1954), 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798.

[3] Grillea v. United States, 232 F. 2d 919; Rich v. Ellerman & Bucknall S.S. Co., 2 Cir., 278 F. 2d 704.

[4] See Fn. 2.

contemporaneous negligent usage of seaworthy appliances. Billeci v. United States, 298 F. 2d 703, 705 (9th Cir. 1962); Morrell v. United States, 297 F. 2d. 662 (9th Cir. 1961); Williams v. The SS Richard De Larrinaga, 287 F. 2d. 732 (4th Cir. 1961); Blankenship v. Ellerman's Wilson Line New York, Inc., 265 F. 2d. 455 (4th Cir. 1959); Peñedo Cia Naveria S.A. v. Maniatis, 262 F. 2d 28 (4th Cir. 1959); Imperial Oil, Lt. v. Drlik, 234 F. 2d. 4 (6th Cir. 1956); Berti v. Compagnie De Navigation Cyprien Fabre, 213 F. 2d. 397 (2d Cir. 1954); Grillea v. United States, 232 F. 2d. 919 (2d. Cir. 1956).

On cases presenting similar fact situations liability for unseaworthiness has been denied. In Arena v. Luckenbach Steamship Co., 279 F. 2d 186 (1st Cir. 1960), the plaintiff, a longshoreman, improper loading caused a loading board to tip, spilling rolls of paper into the hold. The court held that such improper loading by plaintiff's fellow longshoremen did not create a condition of unseaworthiness chargeable to the defendant. In Sullivan v. United States, 203 F.S. 496 (S.D.N.Y. 1961), the plaintiff, a longshoreman working in the hold, was injured when three cartons of frozen beef fell from a pallet and struck him. The court found the accident to have been due to the "transitory or momentary negligence" of the winchmen, employees of the stevedore. The court held: "The fact that the winchmen of the respondent impleaded were guilty of operational negligence did not render the said vessel unseaworthy nor did such negligence create an 'unseaworthy condition.'" 203 F. S. at 503. In Harrel v. Lykes Bros. S.S. Co., 165 F. S. 125 (E.D. La. 1958), the plaintiff, a longshoreman, while working in the tweendeck, was struck by a hundred pound sack of corn which fell from a pallet brought over the hatch through the use of the vessel's equipment. The court found

the accident to be due either to negligent loading of the pallet or negligent manipulation of the draft by the longshoreman operating the winch. The court stated succinctly that:

"No court has as yet held that an improperly loaded pallet makes the vessel unseaworthy. This court does not do so now." (165 F. Supp. at 126). See also Phipps v. N. V. Nederlandsche Amerikaansche S. M., 259 F. 2d. 143 (9th Cir. 1958).

9. There remains to be considered the question of the applicability of the doctrine of instantaneous unseaworthiness, i.e., that, although the ship's equipment was seaworthy, nevertheless, in the few seconds that the improperly fastened draft was being raised, the ship was unfit and the unfitness during that period caused the injury. The law of unseaworthiness has not yet been so extended. Titus v. The Santorini, 258 F. 2d. 352, 354 (9th Cir. 1958); Grillea v. United States, 232 F. 2d. 919 (2d. Cir. 1956). In Morrel v. United States, supra, the plaintiff was injured when a lifeboat in which he had been working fell from its davits due to negligence of a fellow employee. The plaintiff contended: "that a seaworthy lifeboat may be made instantaneously unseaworthy by improper use of a seaworthy safety device by a fellow worker." (9th Cir., 297 F. 2d at 663). The Court held:

"As to the theory of instantaneous unseaworthiness we understand appellants to urge that a safe place to work in a perfectly seaworthy vessel, properly equipped with all safety devices (including a specific warning sign not to turn the lever which was turned by a fellow employee), became suddenly "instantaneously" unseaworthy when that lever was turned, and the boat started to fall; and that such

alleged unseaworthiness, and not the turning of the lever, was the proximated cause of the accident. We reject any such alleged distinction as to proximate cause." (9 Cir., 297 F. 2d. at 664).

To the same effect, Seitz v. M.V. the Captantonis, 203 F. S. 723 (D. Ore. 1962).

Conclusions of Law.

1. The defendant and third party plaintiff was not negligent.

2. The SS CIUDAD DE CUMANA was seaworthy.

3. The plaintiff's injury was caused solely by his own negligence and that of a fellow longshoreman.

4. The complaint and the third party complaint are to be dismissed.

The parties may, on or before ten days from the date hereof, submit additional proposed findings of fact and conclusions of law consistent herewith.

Settle an order, consistent herewith, on or before fifteen days from the date hereof.

End.

APPENDIX D

Opinion, on Prior Appeal, of United States Court of Appeals

U. S. Court of Appeals
Second Circuit

decided January 15, 1962
298 F. 2d 239

Marshall, Circuit Judge

Plaintiff appeals from a judgment entered in the Eastern District of New York dismissing his complaint after trial before a jury which failed to reach a verdict. The sole reason asserted by the judge below in support of his action was "that the plaintiff * * * failed to prove a prima facie case."

1. In reviewing a judgment granting a motion to dismiss after trial, it is axiomatic that the facts are to be viewed in the light most favorable to plaintiff. On February 24, 1955, plaintiff was a stevedore in the employ of John W. McGrath Corp., third-party defendant, and engaged in loading a vessel owned by C. A. Venezuelan Navigacion, defendant and third-party plaintiff. Plaintiff was injured when a pallet loaded with cargo fell while being raised by the ship's winch. The pallet was connected to the winch by means of a cable and a bridle. The bridle consisted of four wires meeting at the top but spreading downward in pyramidal fashion where each was attached to a corner of two metal bars. Two tongs were connected to each bar. When a pallet was to be lifted from the dock to the ship, the tongs were inserted into certain apertures or openings cut into the side of the pallet. Upon an appropriate signal, the winch would lift the pallet.

Appendix D

The evidence for plaintiff indicated that ofttimes the apertures in the pallets were not of the correct size, thus either causing, when too small, the longshoremen to "struggle" to get the tongs in or creating, when too big, a tendency for the tongs and the metal bars to slip completely out. On this occasion, the tongs were placed in the apertures, the signal given, and the pallet raised to eight or ten feet above the dock. At this point, the tongs and bar on plaintiff's side slipped completely out of the apertures, thus causing the cargo-laden pallet to fall on plaintiff. The defendant (third party plaintiff) and third-party defendant presented evidence indicating other explanations for the accident. The jury, of course, was free to accept whichever version it believed and to disregard the others. The District Judge, in ruling upon the motion to dismiss, however, had no such freedom but was bound to accept the evidence most favorable to plaintiff. The question before the judge was whether plaintiff had made out a prima facie case under the doctrine of unseaworthiness upon the testimony so viewed.

(2, 3) The doctrine of unseaworthiness imposes upon a ship owner an absolute duty to furnish a vessel and appurtenances thereto reasonably fit for their intended use. Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 C. Ct., 926, 4 L. Ed. 2d 941 (1960). The fact that the stevedoring firm may have supplied the defective appurtenances, here the pallet, does not absolve the vessel owner from liability under the doctrine. Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir., 1953), aff'd per curiam 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954); Reed v. The Yaka, 183 F. S. 69 (E. D. Pa. 1960). Nor is the fact that the injury occurred on shore a bar to recovery so long as the requisite maritime "status" or "relation" is present. Strika v.

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Netherlands Ministry of Traffic, 185 F. 2d 555 (2 Cir., 1950), cert. denied 341 U. S. 904, 71 S. Ct. 614, 95 L. Ed. 1343 (1951), Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. S. 812 (E. D. Pa. 1959).

4. In the light of these precedents, we have little choice but to reverse and remand for a new trial. From plaintiff's evidence, the jury could have found the pallet was being put to its intended use, the apertures in the pallet were not reasonably fit for that use, and the defects in the pallet caused plaintiff's injuries. From this it might have concluded the ship was unseaworthy and plaintiff should have recovery. We must, therefore, reverse and remand for a new trial. The dismissal of the third party complaint must also be reversed and remanded.

Reversed and Remanded.